

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAAMAN MALEK SADER,

Defendant-Appellant.

UNPUBLISHED
February 20, 2014

No. 312266
Wayne Circuit Court
LC No. 12-000767-FH

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

Defendant appeals by right his bench trial convictions of felonious assault, MCL 750.82, and possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two years' probation for the felonious assault conviction, to be served concurrently with the mandatory two years' imprisonment for the felony-firearm conviction. We affirm.

On appeal, defendant contends that the trial court abused its discretion and denied him his constitutional rights to confrontation and to a fair trial by allowing the late endorsement of res gestae witnesses. We disagree. We review a trial court's decision to permit or deny the late endorsement of a res gestae witness for an abuse of discretion. *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003).

A res gestae witness is a person who witnessed some event in the continuum of the criminal transaction and whose testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). Under MCL 767.40a, the prosecuting attorney must provide a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers. Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his attorney a list of the witnesses the prosecuting attorney intends to produce at trial. MCL 767.40a(1) and (3). The prosecuting attorney may add or delete from the list of witnesses the prosecuting attorney intends to call at trial "any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4).

The underlying purpose of MCL 767.40a is to provide notice to the accused of potential witnesses. *Callon*, 256 Mich App at 327. The plain language of the statute reveals that the Legislature did not intend for the statute to act as a bar to relevant evidence. *Id.* Rather, the

statute provides the trial court with the discretion to permit the prosecution to amend its witness list at any time to add or delete witnesses. *Id.* Furthermore, the statute was not designed to allow defense counsel to engage in “gamesmanship.” *Id.* at 328. Consequently, even if MCL 767.40a is violated, a defendant must show prejudice from the violation. *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994). Specifically, the defendant must demonstrate unfair prejudice that would warrant a new trial for a purported violation of MCL 767.40a. *Callon*, 256 Mich App at 328-329. Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved. *Id.* at 328. “Where, as here, there is no cognizable prejudice to defendant in allowing endorsement, excluding the testimony would convert the salutary purpose of discovery into a weapon against the truth-determining function of the trial process.” *People v Burwick*, 450 Mich 281, 297; 537 NW2d 813 (1995).

The record indicates that the prosecuting attorney failed to timely send to defendant or his attorney a complete list of the witnesses the prosecuting attorney intended to produce at trial and failed to establish good cause for the failure. Thus, the prosecuting attorney failed to specifically comply with MCL 767.40a(3) and (4). However, defendant has not demonstrated that the late endorsement of witnesses prejudiced him. Both witnesses were in the same room where the incident occurred and witnessed it firsthand. Therefore, defendant was on notice that the two witnesses at issue were at the scene. After the late endorsement, the court offered defense counsel the opportunity to take more time to prepare for the late endorsed witnesses. Although defense counsel had argued that the late endorsement did not give him the opportunity to prepare, he did not request a recess or adjournment. “Where the trial court adopts procedures to guarantee defendant adequate time to prepare and defendant fails to articulate any prejudice due to the late [e]ndorsement, allowing a late [e]ndorsement is not an abuse of discretion.” *People v Heard*, 178 Mich App 692, 696; 444 NW2d 542 (1989). This is not one of the egregious cases for which the extreme sanction of precluding relevant evidence is reserved. *Callon*, 256 Mich App at 328. Defendant was not denied a fair trial or his right to confront witnesses. The trial court’s decision to allow the *res gestae* witnesses to testify was not an abuse of discretion.

Affirmed.

/s/ Peter D. O’Connell
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter